No. 3107.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Penn Development Company, a Corporation,

Appellant,

against

C. E. Stoner, F. E. Schaad, D. L. Peters, E. B. Rhodes and S. W. Odell, Late Directors and Now Trustees of Ventura-California Oil Company, a Corporation, Pacific Petroleum Company, a Corporation, and W. H. Cochran,

Appellees.

BRIEF FOR APPELLANT.

THEODORE MARTIN,
Solicitor for Appellant.

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Of Counsel.

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STATEMENT OF THE CASE.

This appeal is from the final decree entered in the above entitled cause, by the District Court of the United States, Southern District of California, Southern Division.

The decree primarily, and *inter alia,* adjudges, in substance, that the defendant and appellee, Pacific Petroleum Company, is solely and personally liable for the payment of the certain debt of $47,951.00, with interest, to the plaintiff and appellee, Ventura-California Oil Company, through its substituted trustees [Record, page 45]; that the said debt is a first lien upon the certain described real and personal property of the defendant and appellant, Penn Development Company [Record, page 38]; and that, in case of default in payment of the said debt, the said real and personal property should be sold to satisfy the same. [Record, page 40.]

The action was instituted and brought in the Superior Court of the State of California, in and for the County of Ventura. From that court the action was subsequently removed to the District Court of the United States, for the Southern District of California, Southern Division, in which it was heard and tried. And that Honorable Court, on August 1, 1916, made its final decree in the said action, which is now the subject of this appeal.

The second amended complaint, on which the trial of the action was had, sets forth two alleged causes of action.

The first alleged cause of action is that the defendants claim to have some interest in the real and personal property particularly described in the complaint; but that neither of the said defendants have any right, title, or interest whatsoever therein. [Record, page 19.]

The second alleged cause of action pleads a certain contract between the plaintiff, Ventura-California Oil Company, and one Stephen W. Dorsey, for the sale by the said company and the purchase by the said Dorsey of the property in question, upon certain specified terms and conditions of payment; the assignment to, and assumption by the Pacific Petroleum Company of the said contract; and a certain other agreement between the said Pacific Petroleum Company and Penn Development Company (this appellant), "by which it (Penn Development Company) obtained some interest in and to the said property, or some portion thereof, but such interest, if any it has, was taken subject to and with full knowledge of all the right, title and interest of the plaintiff." It further alleges that certain specified terms and conditions of the said Dorsey contract have not been paid, nor complied with, "and that by reason of said failure the said defendants, and each of them, have forfeited all right to said premises." [Record, pages 20 to 24.] And judgment is prayed that the amount thus alleged to be due, be ascertained by the court: and that if the same be not paid, the defendants be foreclosed from any right, title or interest in, or to the property in question. [Record, page 24.]

The defendant, Penn Development Company (this appellant), in its answer to the said second amended complaint, specifically denied each and every of the material allegations of that complaint; and affirmatively alleged its ownership and possession of the property referred to; and also affirmatively alleged, as a defense, that on March 11, 1914, it had purchased and

acquired, for a good and valuable consideration, the said property; and that ever since then it has been the owner, and in possession thereof. [Record, pages 26 to 29.]

The trial of the action established, *inter alia,* the following facts pertinent to the issues involved.

On February 19, 1913, and for the purpose of securing the payment of its certain specified and contemplated total loan and indebtedness of $50,000.00 with interest (of which amount, however, by subsequent agreement between the respective parties, only $25,000 in all was actually loaned), the said Ventura-California Oil Company made its certain deed of trust to the Citizens Trust and Savings Bank [Defendant's Exhibit 1—Record, page 126], and thereby conveyed to the said Citizens Trust and Savings Bank the certain real and personal property mentioned in the complaint (and which, at the time of the making of the said deed of trust, was owned and possessed by the said Ventura-California Oil Company), such conveyance being made upon, and for the trust purposes in said deed particularly specified, and which, in substance, were for the securing of the payment of the above mentioned loan and indebtedness, and, in case of default in such payment, then for the sale of the said real and personal property to satisfy and repay the same.

Subsequently, and by an instrument dated July 22, 1913, the said Ventura-California Oil Company and one Stephen W. Dorsey entered into a certain instrument in writing [Plaintiff's Exhibit A—Record, page 11], whereby the said company agreed to sell to the

said Dorsey, and the said Dorsey agreed to buy from the said company, the certain hereinbefore mentioned real and personal property, and also to pay the said company as follows, therefor:

(a) By transferring to the said company within thirty days from the date of the said instrument, 11,000 shares of Pacific Petroleum Company (one of the defendants and appellees herein), of the par value of $110,000;

(b) By likewise transferring $25,000 par value of first mortgage bonds of said Pacific Petroleum Company;

(c) By paying $15,000 in cash, on or before November 1, 1913;

(d) By agreeing to assume and agree to pay the certain above mentioned indebtedness of the said Ventura-California Oil Company, secured by its aforementioned trust deed to Citizens Trust and Savings Bank, and which trust deed was then a lien against the aforementioned real and personal property.

By a certain other instrument in writing, dated July 24, 1913 [Plaintiff's Exhibit B—Record, page 15], the said Dorsey purported to assign to the said Pacific Petroleum Company the last aforementioned instrument, Plaintiff's Exhibit A.

On August 10, 1913, the day when the first installment of interest on the aforementioned indebtedness of the said Ventura-California Oil Company became due and payable, default was made in the payment thereof; and the holders of the said indebtedness, in accordance with the provisions of the aforementioned

trust deed, declared the whole of the principal sum of said debt, to-wit: $25,000, with interest, to be due and immediately payable. [Record, page 103.]

Thereafter, the said Citizens Trust and Savings Bank, the trustee named in the said deed of trust, proceeded with the sale of the aforementioned real and personal property, as directed, and required of it by the said deed; and, on March 11, 1914, sold the same at public auction, unto "William H. Cochran, trustee for the Penn Development Company, a corporation, created and existing under the laws of the state of Delaware," for the sum of $29,345.82, which was the highest bid received therefor. And, on the said March 11, 1914, the said Citizens Trust and Savings Bank also executed and delivered its proper deed of conveyance of the said real and personal property, unto the said William H. Cochran, as such aforementioned trustee. [Plaintiff's Exhibit C—Record, page 100.]

On March 23, 1914, the said Cochran conveyed the said real and personal property to the said Penn Development Company (the appellant herein). [Deed—Defendant's Exhibit 2—Record, page 142.] And the said company ever since then has been, and still is, the sole owner and holder of the said property.

The decree appealed from makes three primary and distinct findings, in substance, as follows:

1. That there are due and unpaid to the plaintiff, Ventura-California Oil Company, certain specified sums of money, under its contract [Plaintiff's Exhibit A] with Dorsey, providing for his purchase from the said company of the premises involved in this action; that

said sums are "a part of the purchase price of said premises, and that plaintiffs * * * have a first lien upon the said premises" for the payment thereof. [Decree—Record, page 38.]

2. That, in so far as the interests of the said Ventura-California Oil Company are concerned, the interests of this appellant, Penn Development Company, in the aforementioned premises, constitute and are only "a mortgage, and as such are subject to and inferior to the title and rights of the plaintiffs." [Decree—Record, page 39.]

3. That in default of the payment of the aforementioned moneys, the aforementioned premises should be sold to satisfy and pay the same. [Decree—Record, page 40.]

To each and every of the said findings, *inter alia,* the defendant, Penn Development Company, has made its proper assignment of error on this, its appeal from the said final decree.

In What the Decree Appealed From Is Alleged, by This Appellant, to Be Erroneous.

On this appeal from the above mentioned final decree, the appellant duly filed and served its proper "Assignment of Errors" [Record, pages 148 to 156], in and by which appellant particularly specified and assigned the errors asserted, and intended to be urged, and upon which it would rely, on said appeal.

Appellant now states that the decree appealed from is erroneous in each and every of the particulars specified in said "Assignment of Errors." But, in order to

"A."

WAS THIS $15,000.00 PAID TO PLAINTIFF?

The only testimony to support the alleged failure to pay the $15,000.00 in question, was given by Mr. Odell, the president of the plaintiff company. He testified that he knew that it had not been paid. [Record, page 73.]

In view, however, of the verified answer of Pacific Petroleum Company, that such payment had been made, is it not significant that the plaintiff's treasurer and secretary, Mr. Peters, who apparently had full charge of the company's affairs, was not called as a witness? It appears in the record that Peters was not only the largest stockholder of the company [Record, page 141], but that he also "was the active manager in controlling the wells and trying to sell the property, he was our secretary and treasurer and RECEIVED THE MONEY and paid it out on orders of board of directors." [Testimony of Odell—Record, page 54.]

The failure of the defendants to offer any proof to sustain their contention that this $15,000.00 had been paid to the plaintiff, is fully explained by the statement of Mr. Porter, one of the attorneys for the Pacific Petroleum Company, that its "answer was verified by Senator Dorsey, who was very positive in his statement to us that it had been paid. But he being dead, now, we are not able to prove that allegation." [Record, page 97.]

While all this may not constitute legal proof of either the payment, or non-payment, of the money in question, it certainly is of material importance to the case as a

whole; and considered in conjunction with certain other established facts—which will be discussed hereafter—tends to throw much light on the question of the good faith and legality of the plaintiff's claims in this action.

"B."

THE REQUIRED BONDS WERE TRANSFERRED, OR, AT LEAST, THEIR EQUIVALENT WERE TRANSFERRED TO, AND ACCEPTED BY, THE PLAINTIFF, IN FULL SATISFACTION THEREFOR.

As to the $25,000.00 par value of bonds called for by the Dorsey contract, Mr. Odell testified [Record, page 49] that they were not delivered to the plaintiff company. He admits, however, the company's receipt of the like amount of "so-called interim bonds."

That the plaintiff, however, accepted these interim bonds in full satisfaction and payment of the terms of the Dorsey contract relative to the transfer of $25,000.00 par value of Pacific Petroleum Company bonds, is incontrovertibly established by the instrument, Plaintiff's Exhibit E, which is signed by the plaintiff, and which formally acknowledges its receipt of the stock and interim bonds in question. That instrument is as follows [Record, page 122]:

"Los Angeles, Calif., Oct. 31, 1913.

Received from Stephen Dorsey, and in behalf of the Ventura-California Oil Company, twenty-five thousand dollars ($25,000.00). 6%, ten year interim bonds of the Pacific Petroleum Company, and eleven thousand shares (11,000) of the capital stock of said Petroleum

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Company, AS FULL PAYMENT TO SAID COMPANY EXCEPT THE CASH PAYMENT OF FIFTEEN THOUSAND DOLLARS ($15,000.00) AND THE PAYMENT OF AN EXISTING TRUST DEED AGAINST SAID VENTURA OIL COMPANY'S PROPERTY FOR TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), both of which are to be paid by the Pacific Petroleum Company, according to the terms of the agreement relating thereto.

VENTURA-CALIFORNIA OIL COMPANY,
By"

It was signed "By D. L. Peters" [Record, page 75], who was the secretary and treasurer of the said Ventura-California Oil Company. [Record, page 54.]

Inasmuch as plaintiff, by this instrument, acknowledges these so-called interim bonds to have been not only received by it, but also to have been received "IN FULL PAYMENT TO SAID COMPANY" of the terms and provisions of the Dorsey contract relative to Pacific Petroleum Company bonds, can plaintiff now be heard to say either that it did not receive said bonds, or that such bonds, as it did receive, did not satisfy the requirements of that contract?

The well established and generally recognized "Oral evidence rule, which declares evidence, the effect of which is to vary the terms of a written instrument, or to change, cut down, or alter the affect thereof, to be inadmissible" (McKelvey on Evidence, Sec. 274), precludes any attempt to vary, or modify, the terms of Plaintiff's Exhibit E, or the full force and legal effect thereof.

As a matter of fact, this instrument was offered in evidence by the plaintiff itself, was not in any way questioned or attacked, nor was a word of testimony given about it, other than as to its mere execution and delivery.

THIS EXHIBIT E, THEREFORE, CLEARLY ESTABLISHES THE PLAINTIFF'S LEGAL AND BINDING ACCEPTANCE OF THESE INTERIM BONDS, AS FULL PAYMENT AND SATISFACTION OF THE REQUIREMENTS OF THE DORSEY CONTRACT RELATIVE TO PACIFIC PETROLEUM COMPANY BONDS.

It may also be fairly contended that Plaintiff's Exhibit E operated as a modification of the Dorsey contract, if any such modification should be considered legally essential.

And further, as these interim bonds were accepted by the plaintiff "IN FULL PAYMENT," how can it now be heard to question their value?

But in any event, there is positively no testimony as to their value. Their expressed face value is, therefore, conclusively presumed to be the true one.

The second amended complaint alleges simply that, under the Dorsey contract, plaintiff was to receive "$25,000.00 PAR VALUE of first mortgage bonds of Pacific Petroleum Company." As already shown, plaintiff accepted a like amount of this company's interim bonds "in full payment" of this provision of the Dorsey contract. As ONLY "PAR VALUE" was agreed on in the contract, and as such value was also the only claim relative to these bonds, made in the complaint, how can the question of their actual value be material, or rele-

vant to the issues in this action? But, as already said, there is no testimony whatsoever, as to their actual value, or that these interim bonds did not have their full expressed face value.

The decree appealed from adjudges that there was due to the plaintiff, under the Dorsey contract, bonds "having *a value* of twenty-five thousand dollars ($25,000.00); that said bonds were not delivered and have not and cannot be delivered" [Record, page 38]; and that $25,000.00 therefor is due to the plaintiff.

There is no evidence to support any one of these findings.

As to the "value" of the bonds, it has been already shown that it was only "par value," which was agreed on in the Dorsey contract, and sued for in the second amended complaint. Mr. Odell apparently attempted, in the face of appellant's overruled objection, to place some other value on these bonds, by testifying [Record, page 53] that it was represented that "they would be par value, gilt edge security." He again, however, emphasized that only "par value" was agreed on in the Dorsey contract; but he apparently attempted to prove some further, independent, oral representation, that the bonds were to be "gilt edge security." What is meant by this later characterization is not explained, nor made clear. And there is no authority for a court to presume, or assume, that, even if used, it meant that the actual value of the bonds would be the equivalent of the expressed face and par value. As is well known, the every day dealings in bonds of the character of the bonds here in question, show that the actual value

thereof is practically always lower than the par value. But moreover (as discussed, *supra*), oral testimony is not admissible, particularly against objection [Record, page 53], to vary the expressed terms of the contract itself, that the bonds should have only a "par value" of $25,000.00. And it is repeated, that there is not one word of testimony as to the actual value of the accepted interim bonds, let alone that they had any other value than as expressed on their face. If this alleged representation was made, and was relied upon by the plaintiff, and in fact was intentionally false and not a mere matter of opinion, then it may well be that plaintiff has some action for damages against Dorsey. But such a claim certainly is not pertinent to the issues involved in this action; nor can such damages be collected herein.

The "delivery" of the bonds has also been discussed, *supra,* and while, as found in the decree, the actual bonds were not delivered, it is submitted that their equivalent were delivered, and certainly accepted by the plaintiff in lieu thereof.

Nor is there any testimony, let alone evidence, to sustain the finding of the decree that these bonds "cannot be delivered." The failure of the plaintiff to offer any evidence on this point is particularly emphasized by the fact that the defendant, Pacific Petroleum Company, in its answer, affirmatively alleged that it "has been hindered and delayed in the actual issuance and delivery of its bonds * * * but that this defendant intends in good faith to execute and deliver its said bonds." The initiative and burden of proving what has thus been so erroneously adjudged in the de-

cree, certainly rested on the plaintiff; and yet it offered no proof relative thereto.

This appellant respectfully submits that the requirements of the Dorsey contract for the transfer of certain bonds have been fully satisfied and performed.

II.

Pacific Petroleum Company Did Not Assume the Contract Between Ventura-California Oil Company and Dorsey.

Even assuming that either, or both of the sums of money specified in the decree are due and payable to the plaintiff, under the Dorsey contract, this appellant contends that such sums are the obligations and indebtedness solely of the said Dorsey; and that the said Pacific Petroleum Company never did legally assume the payment thereof, nor is the said company in any way liable for the same.

The final decree herein adjudges [Record, page 38] that, by the certain alleged assignment [Plaintiff's Exhibit "B"—Record, page 15] from Dorsey to Pacific Petroleum Company, of the Dorsey contract [Plaintiff's Exhibit "A"], the said company "assumed and agreed to pay the moneys to be paid as provided by said contract, and to perform all the covenants therein mentioned"; and further [Record, page 45], that the said "Pacific Petroleum Company * * * is personally liable for the payment of the debt" created thereby.

This alleged assignment [Plaintiff's Exhibit "B"], in terms, purports to assign to the said Pacific Pe-

troleum Company the said Dorsey contract [Plaintiff's Exhibit "A"], "subject to all the conditions contained in said agreement upon the part of the party of the first part herein (Dorsey) to be performed and which the party of the second part herein (Pacific Petroleum Company) agrees to perform."

This alleged assignment [Plaintiff's Exhibit "B"] is signed and executed solely by the said Dorsey. And there is not the slightest suggestion of any proof that it was made with either the knowledge, or the consent of the said Pacific Petroleum Company; nor that it was ever received, or accepted by, or even brought to the knowledge of the said company; nor that it was ever formally ratified, and the Dorsey contract assumed, as the law requires for the legal and binding assumption of the debt of another. (California Code of Civil Procedure, Sec. 1973.) Whatever liabilities, if any, were created by the Dorsey contract, were unquestionably solely and exclusively against Dorsey personally. And such liabilities cannot be shifted from his shoulders, and made the obligations of another, unless such third party legally assumes such liability, in the form and manner required by the statute of frauds, just cited.

The appellant contends that this alleged assignment is invalid under the statute of frauds, at least in so far as it undertakes to put on Pacific Petroleum Company any liability for Dorsey's obligations under his contract, Plaintiff's Exhibit "A."

California Code of Civil Procedure, Sec. 1973, provides as follows:

> "In the following cases the *agreement is invalid,* unless the same, or some note, or memorandum thereof be in writing, *and subscribed by the party charged,* or by his agent. * * *
>
> "2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of the Civil Code."

California Civil Code, Sec. 1624, provides to like effect.

Nor does this case come within any of the exceptions to the statute of frauds, provided for in Sec. 2794 of the California Civil Code.

As this alleged assignment, Plaintiff's Exhibit "B," was not subscribed by the Pacific Petroleum Company, it is invalid, under this statute, in so far, at least, as it purports to make that company liable for the payment of any of the moneys, or the performing of any of the covenants, or obligations, provided for by the Dorsey contract.

The plaintiff itself practically concedes the correctness of this proposition of law, and forcibly emphasizes it, in the second amended complaint. In its original complaint, plaintiff alleged in paragraph III [Record, page 6], simply that in and by the "said assignment, the said defendant, Pacific Petroleum Company, agreed to perform all the covenants on the part of said Dorsey contained in said contract to be performed and assumed and agreed to pay all the payments provided therein." In its second amended complaint, second cause of

action, paragraph III [Record, page 22], plaintiff not only repeats this allegation, but also supplements it with the further allegation that the said defendant, Pacific Petroleum Company, *"accepted said assignment and entered into possession of said property."*

It must, therefore, be apparent that the plaintiff at last recognized the futility of its claim that Pacific Petroleum Company had become liable for any of Dorsey's indebtedness and obligations under his contract with the plaintiff, simply because of the mere recital of the assumption thereof in the Dorsey assignment. And in its second amended complaint the plaintiff clearly attempted to bolster up its position, and to bring the assignment within the provisions and conditions of the statute of frauds, by alleging that the Pacific Petroleum Company *"accepted said assignment and entered into possession of said property."*

Passing the question as to whether or not such so-called acceptance of that assignment and entry on the property, even if made, would take the case without the statute, *not a scintilla of proof was offered at the trial to show either the alleged acceptance of this assignment by the Pacific Petroleum Company, or that the company ever entered upon the property in question.* Nor was any finding relative thereto, made in the final decree now appealed from.

That Pacific Petroleum Company did not assume the Dorsey contract, nor did even the plaintiff look to that company for its performance, is also clearly established by the receipt, which the plaintiff gave for the stock and bonds called for by that contract. That receipt

[Plaintiff's Exhibit "E"—Record, page 122] acknowledges that these stock and bonds were *"received from Stephen W. Dorsey."* As this receipt was not given until October 31, 1913—several months after the alleged assignment—why did it not run to Pacific Petroleum Company, if that company had undertaken to perform the Dorsey contract, as plaintiff now claims? Does not this receipt truly show that Dorsey himself was endeavoring to carry out his own contract; and that the plaintiff was looking to him solely for its performance?

Aside also from the law relative thereto, as just presented, to argue that such an *ex parte* assignment could possibly legally bind a third party—even although his assumption of liability is set forth in the instrument—seems such an affront to ordinary intelligence, let alone to courts of law and equity, that it is hardly creditable such a claim, or argument will be presented by the plaintiff-appellee.

III.

Even Although Any Moneys May Have Become Due to the Plaintiff Under the Dorsey Contract, Such Moneys Were Not and Are Not a Lien Upon the Property Involved in This Action.

The decree herein adjudges that the $15,000.00 in cash, and the $25,000.00 par value of bonds of Pacific Petroleum Company, provided to be respectively paid and transferred by the Dorsey contract, to the plaintiff, are due and unpaid, and that the same are "a part of the purchase price of said premises, and that plaintiffs

* * * have a first lien upon the said premises" for the payment thereof. [Decree—Record, page 38.]

It is impossible to find any testimony in the case, or to discover any theory, principle, or rule of law or equity, which would even tend to support this finding of the decree.

The most cursory examination of the Dorsey contract, Plaintiff's Exhibit "A" [Record, page 11], shows that it is nothing more than an agreement for sale and purchase—Ventura-California Oil Company (the plaintiff) agreeing to sell, and Dorsey agreeing to buy, the property in question, on certain specified terms and conditions. And even this plaintiff so characterizes it in its second amended complaint. [Record, pages 20 and 22.]

This contract provides that *should Dorsey "fail to pay any of the sums* * * * *provided to be paid* or transfer to the party of the first part (plaintiff herein) the bonds or the capital stock * * * mentioned, *then* and in such case the *party of the first part may proceed to collect the value thereof by any proper action*, or may foreclose this contract, and in such case the party of the second part (Dorsey) shall forfeit all moneys, bonds, or stocks theretofore paid hereon." [Record, page 13.]

This contract further provides that "upon full payment being made, as herein agreed, the party of the first part agrees to make, execute and deliver sufficient deeds to transfer all of its title to the party of the second part." [Record, page 14.]

It is, therefore, clearly apparent that the plaintiff did not part with any of its title to the property, nor did Dorsey acquire any title to it. The contract cannot, in any way, be construed as a conditional sale, under which, of course, title to the property would have passed, and any unpaid part of the agreed purchase price would have been a lien on it. The contract is purely and simply Dorsey's contract to make certain payments, which, if made, would entitle him to a deed of the property; and if he failed to make such payments, then action might be brought against him for their recovery.

But as the plaintiff retained the full and complete title to the property, on what possible theory can it be held that any possibly unpaid moneys under this contract, are a lien on the property? *How is it possible for the absolute legal owner of property, to also have a lien on it? How can he have a lien on what he owns?*

Appellant further contends, that even assuming, for the sake of this argument, that any moneys were due to the plaintiff under the Dorsey contract, and that plaintiff at one time might have had a lien therefor on the property herein involved, such lien, if any, was totally extinguished and lost, by the public foreclosure sale of the said property, by Citizens Trust and Savings Bank, under the aforementioned trust deed.

Before taking up any presentation of this contention, it is important, and also instructive, as throwing some side light on plaintiff's real attitude in this case, to exactly fix the dates when the Dorsey contract, and the alleged assignment thereof, were respectively actu-

ally made, and respectively became legally effective; and also the relative standing of said instruments with the plaintiff's trust deed.

The trust deed from plaintiff to Citizens Trust and Savings Bank was dated, completely executed, and delivered on February 19, 1913; and was recorded on February 27, 1913. [Record, pages 126 to 142.]

As to the Dorsey contract, the second amended complaint alleges simply that "on the 22nd day of July, 1913," this contract was entered into. [Record, page 20.]

As to the alleged assignment of this contract, the second amended complaint alleges [Record, page 22] that "by a written assignment bearing date of June 24, 1913," the said contract was assigned to Pacific Petroleum Company; and "that said assignment was duly acknowledged." The date of such acknowledgment is not, however, set forth.

Both this contract and the alleged assignment thereof, were recorded on the same day, viz., on October 19th, 1913. [Record, pages 5 and 6.] The statement of this recordation having been made on "August 19, 1913," which appears on page 49 of the record, is an apparent error as to the month.

The original contract [Plaintiff's Exhibit A] shows that, while it was dated July 22, 1913, it was not actually executed and acknowledged until August 13, 1913. [Record, page 14.]

Likewise, the original assignment [Plaintiff's Exhibit B] of this contract shows that, while it was dated July 24, 1913, it was not actually executed and acknowledged until August 16, 1913. [Record, page 16.]

The finding in the decree [Record, page 37] that this contract was entered into "on the 22nd day of July, 1913," is, therefore, clearly erroneous, for it is beyond question that any contract is complete until actually executed, acknowledged and delivered, no matter what date it may bear. And it is only then that a contract can be legally said and held to have been "entered into."

But why all this juggling of dates; and the attempted evasion of the true and complete facts?

Is it not most significant that both these instruments are *dated just before, but not actually executed until just after* the Ventura-California Oil Company had defaulted on August 10, 1913 [Record, page 103], in the payment of its interest due that day, to the Citizens Trust and Savings Bank, under its trust deed, and the whole of the principal sum secured thereby had also become due and payable?

The Dorsey contract was, of course, subordinate, in every way, to the plaintiff's trust deed. But, in as much as it was not executed and delivered until after plaintiff had defaulted in carrying out the terms and provisions of this trust deed, the contract became further subject to all the equities, which legally and equitably arose on such default, and on the declaring of the whole of the principal debt to be "due and immediately payable."

When the first installment of interest on the indebtedness secured by this trust deed became due and payable on August 10, 1913, and default in the payment thereof was made by the plaintiff herein, the whole of

the principal and interest of said indebtedness was declared due and immediately payable [Record, page 103]; and the said trustee proceeded to sell the property involved in this action in the form, manner and as required by its trust deed. On March 11, 1914, the said property was offered for sale at public auction; and at that sale the defendant, William H. Cochran, as trustee for Penn Development Company (this appellant), was the highest and successful bidder therefor, and the said property was sold to him for the sum of $29,345.82. [Record, pages 100-109.] Subsequently on the said 11th day of March, 1914, the said Citizens Trust and Savings Bank executed and delivered unto the said Cochran, as trustee aforesaid, a full, proper and legal deed of conveyance of all of the said property. [Plaintiff's Exhibit C—Record, page 100.] On March 23, 1914, the said Cochran transferred and conveyed the said property to the said Penn Development Company [deed—Defendant's Exhibit 2—Record, page 142]; and the said company ever since then has been, and still is, the sole, lawful owner and holder of the said property. The plaintiff alleges in its seconded amended complaint that it is *"in possession"* of the said property. [Record, page 18.] But it offered not a word of testimony to even endeavor to sustain that allegation. The deliberate falsity of this allegation is also shown by the testimony of Mr. Cochran [Record, page 95], which clearly establishes the continuous and unquestioned possession of this property by the Penn Development Company since the sale thereof on March 11, 1914.

If there were any moneys due under the Dorsey contract, and even assuming, for argument, that they were a lien on the property in question, would not such lien have been subordinate and secondary to the trust deed, inasmuch as the Dorsey contract was not made until several months after that deed? And would not, therefore, such lien have been foreclosed and extinguished by the foreclosure sale of the property under that trust deed? Can it be seriously contended that a foreclosure sale of property under a trust deed, or a mortgage, does not absolutely foreclose and extinguish all subordinate liens thereon, and interests therein?

The Dorsey contract created simply a personal liability, on his part, for default in any of its terms and provisions, which default might be sued on in the proper action, and any unpaid amounts due under that contract, recovered by the plaintiff. But certainly none of such amounts were a lien upon the property, as already shown.

It is conceded that, at the time this trust deed was made, and also at the time of the making of the Dorsey contract, the plaintiff, Ventura-California Oil Company, was the owner and in possession of the property in suit.

Appellant, however, contends that plaintiff was completely foreclosed and divested of such title by the sale of the property under the trust deed, and the conveyance thereof to it.

It is difficult to find any theory, or principle of law, which could possibly support this finding of the decree, that the Penn agreement establishes the deed from Citi-

zens Trust and Savings Bank, which by its unquestioned terms absolutely conveyed the property in suit, in fee simple, to be nothing more than a mortgage on the property. The honorable trial court filed no opinion and that court's line of reasoning and deduction is, therefore, not disclosed. Nor did plaintiff's counsel, on the argument of the case in the court below, present any argument to suggest, let alone support, such a finding as this.

Plaintiff's at one time claim, or theory, of its case, is, however, probably explained by the statement of its attorney, Mr. Odell, who testified [Record, page 61] that "I (the witness) relied on my knowledge of the law, which is that if you take subject to a contract, and the transfer is made subject to that contract, you take subject to that contract." And presumably to support this finding, it is the plaintiff's further theory that the Penn agreement, in some way, shows the appellant's purchase of the property to have been made subject to the Dorsey contract.

IV.

Penn Development Company Acquired and Has a Good, Legal and Indefeasible Title in Fee Simple, to the Property Involved in This Action, and Not Merely a Mortgage Thereon, as Adjudged by the Decree Herein.

The final decree in this action, now appealed from, adjudges that the certain agreement between Pacific Petroleum Company and Penn Development Company, and the certain deed from Citizens Trust and Savings

Bank, trustee, to William H. Cochran, and also the deed from said William H. Cochran, trustee, to said Penn Development Company, "constituted and were and are, in so far as the interests of the Ventura-California Oil Company are concerned in the premises, * * * a mortgage, and as such are subject to and inferior to the title and rights of the plaintiffs herein." [Record, page 39.]

The appellant claims legal title to, and ownership of, the said property, under the last two above mentioned deeds. It also contends that the above mentioned agreement does not detract from nor impair such title.

As has been already discussed, *supra,* and as appellant contends conclusively established, neither Dorsey nor Pacific Petroleum Company ever had any title whatsoever to the property in question. In passing, it may well be noticed that the plaintiff, itself, formally recognizes this to be the fact, by the allegation in its second amended complaint, that it simply "entered into a contract by which the *plaintiff agreed to sell and said Dorsey agreed to buy*" [Record, page 20] the property.

If neither Dorsey nor Pacific Petroleum Company ever had any title to this property, how would it be possible for either, or both of them, by any agreement with a third party, to create any mortgage on the property, as apparently is adjudged by the decree herein was done? Mortgages can legally be made or created only by the owners of property. In this case the owner of the property involved herein, at the times in question, was the plaintiff itself.

On February 17, 1913, Pacific Petroleum Company and Penn Development Company entered into the written agreement in question, and which is in evidence as Plaintiff's Exhibit D, at pages 109 to 121 of the record.

As the provisions of this agreement are separately discussed hereafter in this brief, they may be passed for the moment, with the statement that appellant confidently submits that that agreement contains nothing to support any claim that appellant's purchase of the property was made subject to the Dorsey contract; and further that that agreement expressly, and by its very terms conclusively establishes that, by this purchase of the property, *Penn Development Company was "to take title to the same in fee simple, absolutely without conditions, or trust relations of any kind whatsoever,"* excepting the specified condition as to a certain option thereon. [Record, page 111.]

But aside from its particular provisions, its pertinency, materiality, and the agreement as a whole, will be briefly considered.

When this agreement was offered in evidence by the plaintiff, it was objected to as "irrelevant and immaterial" to the issues raised by the pleadings; but such objection was overruled, and an exception taken to that ruling. [Record, page 51.] That the admission in evidence of this agreement was a grievous error, is seriously urged.

The only reference in the second amended complaint to this agreement is in paragraph "IV" of the alleged "Second Cause of action." [Record, page 23.] There this agreement is set forth, and it is alleged to be under

it "by which it (Penn Development Company) obtained some interest in and to the said property."

This allegation of the complaint was specifically denied by Penn Development Company in its answer. [Record, page 28.] And that answer also affirmatively pleaded, as a defense, that that company, for a good and valuable consideration, had purchased and acquired the property referred to on March 11, 1914, that is to say at the trustee's public sale thereof. [Record, page 29.]

As this appellant thus formally disclaimed any claim of title to the property by, through, or under its agreement with Pacific Petroleum Company, that agreement should not have been admitted in evidence, as there was no issue raised by the pleadings to which it was at all pertinent or material. Whatever title or interest Penn Development Company acquired in this property, assuredly was solely through the two above mentioned deeds; and in no possible way through the Penn agreement, as was claimed in the complaint and relied on by plaintiff. The most that can be said as to the materiality of this agreement is that it might show that these deeds were, in fact, intended to be only mortgages. But as no such claim or issue was presented or raised by the pleadings, the agreement was not properly admitted in the attempt to prove any such fact.

Moreover, if, as appellant confidently contends has been conclusively established, Pacific Petroleum Company did not assume the Dorsey contract, it would not be possible for that company to make any agreement,

let alone the one in question, which could, in any way, affect this property or the title thereto.

Plaintiff also apparently abandoned any such claim or theory when it attempted to prove some oral agreement by this appellant that it, Penn Development Company, would carry out the Dorsey contract, meaning thereby, of course, that that company had assumed that contract. Plaintiff then formally abandoned any claim under this alleged oral agreement by its admission that "we are not suing upon this oral contract." [Record, page 61.] And it again shifted its position to the claim that the certain alleged oral conversations operated as an estoppel to this appellant's denying it had assumed the Dorsey contract. These alleged conversations and the so-called estoppel are separately and fully discussed hereafter in this brief.

These several different claims and positions of plaintiff are worthy of comparison.

It first alleged in its second amended complaint that such interest as Penn Development Company obtained in this property was by and through the Penn agreement.

Then it claimed that the Penn Company had orally agreed to assume the Dorsey contract.

And finally it claimed that, while no recovery was asked for on this alleged oral agreement, the Penn Company was estopped by certain alleged conversations from denying its liability for carrying out the Dorsey contract.

These varied claims are certainly sufficiently inconsistent as to raise the fair presumption that plaintiff

was simply on a "fishing excursion" through the facts and the law, in an endeavor to find some claim, theory, or law which would sustain its outrageous and unlawful attempt to deprive appellant of its lawfully and in good faith acquired property.

It is respectfully submitted that plaintiff has not legally established anything which at all impairs the good fee simple title which Penn Development Company acquired to the property in suit; or to sustain the finding in the decree that that company's interest in the property is only a mortgage.

V.

The Agreement Between Pacific Petroleum Company and Penn Development Company, Dated February 17, 1914, Does Not Alter Nor Modify the Propositions Hereinbefore Contended for by This Appellant or Any of the Rules and Principles of Law Cited in Support Thereof.

It is not necessary to go into any prolonged discussion of the detailed provisions of the agreement between Pacific Petroleum Company and Penn Development Company [Plaintiff's Exhibit D—Record, page 109], as the agreement must speak for itself; and unquestionably this Honorable Court will give it full and careful consideration.

Plaintiff's witness, Mr. Odell, was permitted on the trial of this action to give his various theories of and deductions from this agreement. Such testimony was not only objected to, but motions were made to strike it out. These objections were overruled and the

motions denied; and exceptions were taken by appellant to both such rulings. It is submitted that such testimony was improperly and erroneously admitted, and that it should not be considered on this appeal, as the mere opinion of a witness as to the agreement's construction, is certainly most objectionable.

It is, however, desirable to direct this Honorable Court's attention to the general plan, which was not only contemplated, but actually embodied in this agreement.

It must be apparent to even the most casual reader and student of this agreement that it embodies two main and absolutely distinct features. One relating solely and exclusively to the Ventura-California property (the property here in suit) and the other solely and exclusively to the so-called "assets" of Pacific Petroleum Company.

As to this Ventura property, this agreement provides as follows:

"First: The Penn Development Company agrees to purchase at a sum not exceeding thirty thousand dollars ($30,000.00) at the forthcoming trustee's sale, the title in fee simple of the Ventura-California property, described as follows:

* * * * * * * * *

The Penn Development Company is to take title to the same in fee simple, absolutely without conditions or trust relations of any kind whatsoever, except the Penn Development Company shall forthwith enter into an option in the form attached hereto as Exhibit A." [Record, page 111.]

The balance of this agreement is practically entirely devoted to the consideration of the "assets" of Pacific Petroleum Company, a plan for their preservation, for the advancement of certain moneys to carry out such proposed plan, and for the securing and repaying of such moneys as might be thus advanced. It again should be noticed that the purchase of the Ventura property is not in any way included in these provisions of the agreement, and which have been characterized as the "general plan" of the agreement, as distinguished from the distinctly specific and particular provisions relative to the Ventura property.

The reason and necessity for these absolutely distinct provisions as to the Ventura property is clearly pointed out by the testimony of Mr. Cochran, who testified as follows:

"The distinction which was in the minds of my clients is the same that appears in this agreement very clearly. In other words, the situation that was presented to the Penn Development Company—or rather the people who organized it—was, this particular piece of property * * * would be lost unless it was bid in on the 11th of March, by somebody, because the Pacific Petroleum Company didn't have the money, the Ventura-California Oil Company didn't have the money, and nobody who was interested in either one of those companies could raise the money to protect it against that sale. The Pacific Petroleum Company, as appears in this agreement, independent of the Ventura-California property, had a number of so-called leaseholds or interests in other properties. * * * Then

naturally the Penn Development Company didn't want to come out here on a wild goose chase, and they felt that if they got one piece of property they would have something to go ahead on, and, therefore, this agreement was made. But by this agreement the Penn Development Company agreed to purchase it, and then, even, fearing that somebody might quibble and say we were doing something for creditors, or somebody else, the distinct provision was put in that the Penn Development Company was to take title to the same in fee simple, absolutely without conditions, or trust relations of any kind whatsoever except the Penn Development Company shall forthwith enter into an option in the form attached hereto as Exhibit A." [Record, pages 90, 91.] This witness further testified that "There was never a suggestion by anybody in the East or in the West that the Penn Development Company was doing other than buying that property absolutely for itself, subject only to the option; and, as I say, Mr. Peters said to me that that is the only thing that disturbed Mr. Odell, and I heard Mr. Peters call Mr. Odell's office and talk to Mr. Odell—at least he said he did—and Mr. Odell was satisfied with the agreement's execution and the option." [Record, page 91.]

The full details of this last mentioned conversation between Cochran and Peters, which stands uncontradicted, is worthy of the fullest and most careful consideration, not only as establishing plaintiff's personal knowledge of the Penn agreement, but also of the particular provisions thereof. This conversation will

be found, fully narrated, at pages 84 and 85 of the Record. It should also be recalled that Peters was the secretary, treasurer and general manager of the plaintiff company [Record, page 54], and also its largest stockholder. [Record, page 141.]

Again, it should be noticed that this agreement in no way shows that Pacific Petroleum Company made any claim of any title to or interest in the Ventura property; nor is that property included in the list of that company's so-called "assets," which are so particularly specified in the agreement.

The only other references in the agreement to the Ventura property are the following:

(a) In the last paragraph of the agreement Pacific Petroleum Company guarantees that a fee simple title to this property may be bought for not exceeding $30,000 [Record, page 114]; and also guarantees the number, character and condition of the oil wells thereon. [Record, page 115.]

By its expressed terms, these guarantees were made a "part of the essence and consideration of this agreement." Naturally the appellant, which had never seen nor investigated the property which it proposed to buy in for itself, would not have incurred the expense of sending a representative from Philadelphia to California for that purpose, let alone enter into what is practically an entirely independent contract, to advance certain large sums of money to preserve the "assets" of Pacific Petroleum Company, without some assurance and guarantee as to this property, and that it could be bought "in fee simple" for within a certain specified sum.

But these guarantees do not show any title or interest of Pacific Petroleum Company in or to the property. They are nothing more nor less than guarantees of that company as to the conditions under which the property could be bought, no matter who the owner thereof might be, so that the Penn Company might acquire some tangible asset, which would warrant its coming to California, and taking up the entirely independent affairs of the Pacific Petroleum Company.

(b) Paragraph "Sixth" of the agreement provides for what should happen to the above mentioned agreement for the proposed preserving of the Pacific Petroleum Company's assets, in the event that this appellant should be unable to buy in the Ventura property, as was guaranteed to it could be done.

What has just been said, *supra,* as to the guarantees in this agreement, is equally true as to this "Sixth" paragraph thereof.

It is respectfully submitted that this Penn agreement, while but a single instrument, really embodies two separate and distinct matters,—one as to the Ventura property and the other as to the Pacific Petroleum Company assets.

The assertion of plaintiff's attorney and president, when testifying on the trial of this action [Record, page 70], that "This contract must be construed all together," is acquiesced in as a general statement of law. But that general principle of law is not applicable to a contract or agreement which by its very terms covers two separate and distinct features or subject-matters. Provisions which are particularly ap-

plicable to one matter can not be construed as applicable to the other, even although they are all set forth in the same instrument.

Plaintiff contended on the trial of this action that, under its agreement, Penn Development Company had agreed to advance and had simply advanced the money with money with which the Ventura property was bought in by it.

Without going further into the discussion of the provisions of this agreement, this appellant respectfully and particularly directs this Honorable Court's attention to the fact that the provision as to this appellant buying in the Ventura property stands distinctly and completely by itself. And also that when such purchase is completely provided for, the agreement takes up the entirely different and distinct feature of the Pacific Petroleum Company "assets." And it is only as to such assets that "advances" are provided for. There is no suggestion of any other application of the contemplated advances; nor is the Ventura property in any way connected by this agreement with the "advances" proposed to be made. Nor is there any provision for the repayment to this appellant of such moneys as it might pay out in acquiring the Ventura property, excepting in the event that Pacific Petroleum Company should exercise the option to purchase the property, which option was given to it by the Penn agreement.

VI.

The Testimony of Alleged Conversations Between Plaintiff's President and Appellant's Attorney Was Objectionable and Was Improperly and Erroneously Admitted in Evidence.

Against the objections of the defendant Penn Development Company, plaintiff's president, Mr. Odell, was permitted to testify about certain conversations he claims to have had with one of that company's attorneys, Mr. Cochran, prior to the foreclosure sale of the property involved herein, on March 11, 1914.

The plaintiff's perfectly evident purpose in trying to prove these conversations was to establish some liability of Penn Development Company for the carrying out of the Dorsey contract [Plaintiff's Exhibit A].

Mr. Odell testified that Mr. Cochran, on their first meeting each other, said to him that "it (Penn Development Company) would see that the contract between us (plaintiff company) and Dorsey and the Pacific Petroleum Company would be carried out" [Record, page 52]; and that practically the same statement was again made to him by Mr. Cochran at the bank on the day of the sale of the property. [Record, page 60.]

It should be observed that the second amended complaint, on which the trial of this action was had, does not plead nor in fact make any reference to this alleged oral contract thus attempted to be proved by the plaintiff; nor is there even a suggestion of a claim or demand in that complaint that this appellant is in any way liable for the performance of the Dorsey

contract, Plaintiff's Exhibit A. As has been shown and discussed, *supra,* the only claim of the complaint is that, under the Pacific Petroleum-Penn agreement of February 17, 1914, the Penn Company "obtained some interest in and to the said property * * * but such interest, if any it has, was taken subject to and with full knowledge of all the right, title and interest of the plaintiff" [Record, page 23]. As also already said, such alleged claim of title was formally disavowed by appellant in its answer herein.

As these alleged conversations, even if had, did not in any way bear on and were not pertinent to this sole claim of the complaint—but as to which claim there is really no issue involved under the pleadings—the testimony about them was certainly irrelevant and immaterial, and should not have been admitted.

Mr. Odell having testified that "prior to the purchase of the property by Mr. Cochran as trustee of the Penn Development Company, I had a conversation with him in regard to the property" [Record, page 50], (which testimony was objected to by this appellant, the objection being overruled, and exception thereto taken [Record, page 51]), he was asked by plaintiff's counsel, "Now, I am asking you about the conversation you had with Mr. Cochran?" To this question appellant made its objection, was overruled, and exception taken [Record, pages 51-52]. In answer to this question the witness narrated the conversations now under consideration.

Appellant immediately moved to strike out the testimony "as wholly incompetent, irrelevant and imma-

terial." The motion was denied, and exception taken to the ruling [Record, page 53].

On the completion of this witness's testimony the motion to strike out was renewed on the same grounds, and also as further objectionable under the Statute of Frauds, in that it was an attempt, by an alleged oral promise, to make this appellant liable for the indebtedness of a third person, to-wit: any possible indebtedness under the Dorsey contract, which liability, by this statute, could be created only by a written instrument. [Record, pages 75 to 77.]

This later motion was also overruled, and exception taken to such denial, the honorable trial court saying that, "I think you waived the Statute of Frauds in permitting the witness to testify without making an objection at the time, without either pleading it or making an objection." [Record, page 77.] And also holding that this testimony was "entirely relevant even if the Statute of Frauds disbar it. It is good for the purpose of showing knowledge, if nothing else." [Record, page 77.]

As to the Honorable Court's suggestion that this appellant should have pleaded this statute in its answer, it is sufficient to say that there is no allegation in the complaint which even suggests the necessity of such a plea, nor against which this statute could have been interposed.

It is also difficult to see the propriety, legal necessity, or admissibility of this testimony to show that appellant had knowledge of the Dorsey contract, as the court held, inasmuch as that contract was duly recorded

and knowledge thereof was therefore legally imposed on all persons.

Appellant also contends that its plea of the Statute of Frauds was timely made.

It should be noticed that there was nothing in the general question, in response to which this testimony was given, that would even suggest the character of the answer thereto, let alone warrant interposing this statute as a ground of objection. It also should again be noticed that objection was made to this question when asked, and that such objection was overruled.

It was only when this testimony was completed that its objectionable character under this statute appeared. And immediately, then, the overruled motions to strike out were made.

This later contention is sustained by the decision of the New York Court of Appeals in

Holcombe v. Munson, 103 N. Y. 682, 9 N. E. 443,

where it was held that "When parol testimony is offered to show the amount of charcoal a purchaser was to take under a written contract of sale, it cannot be objected to on the ground that it operates to show a parol contract for the sale of personal property amounting to more than $50.00 in value, and void under the Statute of Frauds, *until the evidence discloses the fact that it is objectionable on that ground.*"

But aside from all decisions, and viewing the proposition from a practical, legal and equitable standpoint, how would it be possible to plead the Statute of Frauds

before the objectional character of the testimony actually appeared in the testimony itself, when the question in response to which the testimony was given presented not even a suggestion of any objectionable answer other than what certainly was covered by the objection interposed by the appellant in this particular instance?

But, moreover, the testimony of Mr. Cochran as to these conversations differs materially from that given by Mr. Odell. Mr. Cochran testified as follows: That when he first met Mr. Odell the latter "stated something to the effect that the Ventura-California Oil Company * * * had this money which they stood to lose, and they didn't know what they were going to do, or anything else. * * * I told Mr. Odell generally what our plans were, but in no way—and my memory is positive about it—did I refer to the Ventura-California agreement. Any reference to that was made by himself, and himself alone, and any remarks which I made about the general plans were confined to that, and I did not refer to the Ventura-California contract or agreement in any shape, form or manner. I simply referred to the general plans of the Penn Development Company." And this he again in detail and emphatically later repeats [Record, page 82]. As to the conversation at the bank on the day of the sale of the property, Mr. Cochran testifies that he asked Peters if he was going to bid on the property, and that Peters said "no." That he, Cochran, then went to Mr. Odell and called his attention to the fact that the notice of sale was being read, and that Odell said "I have no

interest in it, or some such expression." [Record, page 85.] And he also positively denies that at this time he told Mr. Odell that "We are going to carry that out," referring to the Ventura-California agreement, and also testifies that "I never said that in the bank, or in any other place, nor at any other time, nor to any other person, and I had no authority to do so in the slightest particular. My authority was limited to this contract." [Record, pages 86, 87.] On cross-examination Mr. Cochran testifies that "Mr. Dorsey did not say in my (Cochran's) presence that the contract would be taken care of and fully carried out; * * * I don't think Mr. Dorsey told you any more than what I have said was said at that time, and that was that if the general plan of the Penn Development Company went through and they did subsequently attempt to finance the Pacific Petroleum Company by making these advances, which do not include the Ventura-California Oil Company, then you people would be taken care of properly." [Record, page 93.] * * * "These general plans of which I have spoken were independent of the Ventura, as shown in this agreement." [Record, page 94.]

It is much to be regretted that this seeming conflict should exist in the testimony of the attorneys for the respective parties involved in the discussion. Such conflict is not, however, irreconcilable, nor beyond satisfactory explanation.

As appears in his testimony, Mr. Cochran never was a stockholder of Penn Development Company [Record, page 92], but "came out here (from New York to

California) simply as attorney-at-law to examine different titles and see that this sale was properly conducted, and any other matters we took over, that the titles were properly searched." [Record, page 87.] He, therefore, had no personal interest whatsoever in the matters involved in this action; his interest therein being purely professional in the capacity of attorney-at-law for his client, Penn Development Company.

On the contrary, Mr. Odell was not only the attorney for Ventura-California Oil Company, the plaintiff herein, but was also personally interested in the company to the extent of 84,976 shares thereof [Record, page 141], out of a total authorized capitalization of 500,000 shares. [Record, page 140.] The amount of stock actually issued does not appear in the record. Mr. Odell was also a director and the president of the company, and is one of the plaintiff-trustees because of the company's dissolution.

Mr. Odell also repeatedly, in his testimony, largely confirms Mr. Cochran's version of these conversations. He testifies [Record, page 55] that Cochran said that "He *would take care of* the Ventura-California Oil Company; that his people would see that it got what was coming to it." And again [Record, page 60], in testifying about the alleged conversation at the bank: "Mr. Cochran assured us again that the *Ventura would be taken care of.*" And again [Record, page 64], Mr. Cochran "stated that *he had an arrangement by which the Ventura-California Oil Company would be taken care of.*"

All this testimony conforms exactly with what Mr. Cochran testifies he said would be done—that is, that if the general plans went through *"all creditors,"* including the plaintiff, "would be taken care of." [Record, page 94.]

Is it not probable that this witness, Mr. Odell, even unwittingly and in the best of good faith, has drawn and stated his own narrow and biased conclusions as to how his company was to be "taken care of," when he testifies that it was to be done by the Penn Company assuming the obligations of the Dorsey contract?

The very improbability of such an undertaking is also an important factor in the weighing of this testimony. It might well be that a person, on some reliable general information, such as was guaranteed to it in the Penn agreement, would be willing to take over a piece of property at the cost of an existing mortgage thereon, in this particular instance approximately $30,000. But it is incredible to believe that any sane business man would obligate himself to a further approximate amount of $50,000 or even take over the property subject to such an encumbrance, without having first seen and thoroughly examined into the property's real value and possibilities.

But again, as has been discussed, *supra,* any default in the Dorsey contract was purely and solely the personal liability of Dorsey, which might be collected from him in a proper action on the contract, therefor; but was in no way a lien or mortgage on the property here involved. Even, therefore, if this appellant was bound by the alleged oral contract to perform the Dorsey con-

tract, no recovery therefor could be had in this action as presented by the second amended complaint, but only in an action on the contract itself, as would have had to be done if recovery had been sought from Dorsey himself.

It is again submitted that the testimony as to these conversations should have been stricken out as being an attempt against the statute of frauds, to make the Penn Company liable, under an alleged oral promise, for the Dorsey indebtedness, if any such indebtedness ever existed.

It may also be fairly and properly contended that plaintiff has formally waived any possible claim for recovery under this alleged oral promise by the sworn statement of Mr. Odell, the plaintiff's attorney, president, and one of its substituted trustees, that "We (the plaintiffs) are not suing upon this oral contract." [Record, page 61.]

VII.

Penn Development Company Is Not Estopped From Denying Any Liability Under the Dorsey Contract.

As already shown, plaintiff formally disavowed any possible claim of liability of Penn Development Company under the Dorsey contract, through any oral promise relative thereto, which plaintiff attempted to prove, and establish. This was done, by the sworn statement of plaintiff's president, Mr. Odell, that "We are not suing upon this oral contract" [Record, page 61]; and has been discussed, *supra*.

Plaintiff, however, on the trial of this action, made some contention that, by certain alleged conversations between plaintiff's president, Mr. Odell, and the Penn Development Company's attorney, Mr. Cochran, the Penn Company was estopped from denying that, under the Pacific Petroleum Company-Penn Development Company agreement, it was not liable for, and bound to carry out the Dorsey contract.

If there be any such estoppel, it certainly must be what is commonly known as an "estoppel *in pais*," or "equitable estoppel."

The fundamental elements which are absolutely essential to create, and also to legally establish, an estoppel of this character, are of such long standing, and so generally well recognized, as, in appellant's judgment, makes it necessary to refer particularly only to those which must be considered in the light of the facts and the testimony in this particular case. To these appellant respectfully directs this Honorable Court's attention and consideration.

A.

To Be Effective, the Estoppel Claimed by the Plaintiff on the Trial of This Action Should Have Been Pleaded in Its Complaint.

Before proceeding with any discussion of the testimony on which plaintiff relies to establish its claimed estoppel, appellant submits that such estoppel, even if it existed, could not be proved nor established on the

trial, as it was not pleaded in the second amended complaint, on which the trial of this action was had.

Newhall v. Hatch, 134 Cal. 249, 66 Pac. 266;
Chapman v. Hughes, 134 Cal. 441, 66 Pac. 982.

In the former case it was held that

"If the appellant had intended to claim that the plaintiff was estopped from asserting the lien of his mortgage against the rights of the appellant, *by reason of any conduct, or representation in reference thereto, this defense should have been specially pleaded.* The proceedings in the former suit were set forth at length and the judgment therein properly pleaded as a bar to the present right of recovery; but *the defense of an estoppel in pais is distinct from that of an estoppel by record, and the facts constituting such defense are new matter, which must be specially pleaded.* Davis v. Davis, 26 Cal. 23; Etcheborne v. Auzeraix, 45 Cal. 121."

On this point, Chapman v. Hughes, after presenting what was first claimed on the trial of the action constituted an estoppel, says:

"If this should be proven and found to be true, doubtless an estoppel *in pais* would be raised against plaintiff and he would not be heard to disavow the act to which previously he had formerly assented, the parties having changed their condition upon the assurance of his consent." And the court then holds, *"But the answer to this is that such an estoppel should have been pleaded, proved and found."*

In the case under review on this appeal, plaintiff did not plead its now claimed estoppel. All testimony relative thereto was, therefore, improperly admitted on the trial.

Nor is there anything in this case which would have prevented plaintiff from formally making such plea of estoppel in its complaint, rather than leaving it to be unexpectedly sprung and claimed on the trial.

The claimed estoppel is based on certain alleged conversations in which plaintiff's president participated; and it was by him that the complaint herein was prepared and verified; and he also was the only witness for plaintiff in support of said conversations. It was all, therefore, directly within plaintiff's personal knowledge, at the time it instituted this action, and made its second amended complaint. The claimed estoppel, therefore, could have been pleaded. The failure to do so precluded any attempt to establish it on the trial.

The conversations relied on have been already fully discussed. It is therefore sufficient, for the moment, to say that the introduction of this testimony about these conversations was not only objected to by this appellant, but that appellant also formally moved to strike out all such testimony when it was completed. To the respective overruling of such objection, and the denial of such motion, appellant duly excepted.

B.

THE BURDEN OF PROVING AND ESTABLISHING THE CLAIMED ESTOPPEL LIES ON THE PLAINTIFF.

Under the well established rule that he has the burden of proof who has the affirmative of an issue, it

cannot seriously be questioned but that, in this case, the burden is on the plaintiff not only to clearly and satisfactorily prove the estoppel claimed, but also to likewise prove all the facts necessary to establish it.

C.

AS PLAINTIFF HAD NOT ONLY THE MEANS OF KNOWLEDGE, BUT ALSO THE ACTUAL KNOWLEDGE OF THE REAL FACTS, THERE CANNOT BE ANY ESTOPPEL.

This principle of the law of estoppel is enunciated in Bigelow on Estoppel (4th Edit.), page 608, as follows:

"The person who claims the benefit of this estoppel *must show that he was ignorant of the truth* in regard to the representation, and *that he was permissibly ignorant thereof. * * * If he knew, or under all the circumstances ought to have known, the facts, the estoppel,* even if the representation was made on oath, *falls to the ground.*"

And again, in Cyc. of Law and Procedure, Vol. 16, page 726 (and cases cited), the law is summarily stated to be that:

"In order to constitute an equitable estoppel * * * the party to whom it (the alleged false representation) was made *must have been without knowledge, or the means of knowledge of the real facts.*"

To the same effect is Biddle Boggs v. Merced M. Co., 14 Cal. 279, in which the essential elements which must be proved to establish the estoppel are particularly set

forth, one of such elements being (page 368) "that the other party *was not only destitute of all knowledge* of the true state of the title, *but of the means of acquiring such knowledge.*"

In the case at bar, plaintiff contends that certain alleged oral statements of the Penn Development Company's attorney, made in the course of his above mentioned conversations with the plaintiff's president, estops the Penn Company from denying that the Dorsey contract was not within the purview of the Penn agreement of February 17, 1914 [Plaintiff's Exhibit D, Record, page 109]; and that it did not, by such agreement, obligate itself to the performance of the Dorsey contract.

As to this contention, appellant submits that not only were the means readily open to plaintiff to acquire full and exact information and knowledge of the Penn agreement, but, further, that the record in this case clearly establishes the fact to be that the plaintiff not only actually had such personal knowledge, but also had a copy of the agreement in question.

It may be, as Mr. Odell testifies, that he personally did not see a copy of this agreement "until after this suit was instituted." [Record, page 63.] But that the plaintiff itself had personally actual knowledge of the terms and provisions of this agreement, as well as a copy thereof, prior to the sale of the property, is established by the uncontradicted testimony of Mr. Cochran that he saw "Peters two or three times between the time of my (his) arrival and the sale. Peters had a copy of this agreement in his possession, discussed it,

and, as I say, was blaming Dorsey, even telling me that he was going to have the agreement, if possible, set aside, because he thought this option was for too long a period." [Record, page 83.] And that Peters, on the day before the sale, called to see and examine the original instrument, to satisfy Mr. Odell that it was "in proper form as to execution, and particularly as to the option"; and that upon such original being handed to him, "he (Peters) took a look at it and read over the execution and then also read over the option." [Record, page 84.] The full testimony on this point, which will be found at pages 83 to 85 of the Record, deserves more attention than has been given in these brief extracts. It also should be recalled that Peters was the largest stockholder of the plaintiff company [Record, page 141], its active manager, and also its secretary and treasurer. [Record, page 54.]

D.

AN ESTOPPEL CAN BE RAISED ONLY WHEN THERE IS CERTAINTY TO EVERY INTENT.

"Before an estoppel can be raised there must be certainty to every intent, and the facts alleged to constitute it are not to be taken by argument or inference."

Cyc. of Law and Procedure, Vol. 16, page 748, and cases cited.

"The representation, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. *Certainty* is essential to all estoppels."

Bigelow on Estoppel (4th Edit.), page 559.

"*Every estoppel,* because it concludeth a man to allege the truth, *must be certain to every intent, and not to be taken by argument or inference.*"

Coke Litt. 3529, quoted approvingly in Vanbibber v. Beirne, 6 W. Va. 168, 178.

"*If an act or admission is susceptible of two constructions, one of which is consistent with a right asserted by the party sought to be estopped, it forms no estoppel.*"

Ware v. Cowles, 24 Ala. 446, 60 Am. Dec. 482.

In Brigham Young Trust Co. v. Wagner, 40 Pac. 764, the rule of what must necessarily be proved to create an estoppel of this character is thus stated:

The party against whom the estoppel is claimed should have

"First, falsely represented or concealed a material fact; second, the false representation or concealment must have been knowingly made; third, the party pleading the estoppel must have been ignorant of the facts; fourth, the representation must have been made with the intention that it should be acted upon; fifth, the party pleading it must have been misled thereby, to his injury in some substantial particular."

The conversations in which this alleged representation was made have been already discussed, *supra,* and it is, therefore, unnecessary to again go into them. The testimony of the respective participants in these conversations (Mr. Odell and Mr. Cochran) is in perfect accord to the extent that Mr. Cochran stated

that the plaintiff *"would be taken care of."* It is in conflict, however, as to the further parts of these conversations, as to how, or under what conditions, this "taken care of" was to be done. Mr. Odell testified that Mr. Cochran stated that the Penn Company *"would see* that the contract * * * would be carried out." [Record, page 52.] He, however, later modifies this, by his testimony that Mr. Cochran stated "that his people *would see* that it (plaintiff) got what was coming to it." [Record, page 56.] These alleged statements are positively denied by Mr. Cochran, who also testified that he stated only "that *if the general plan of the Penn Company went through * * * then you people (plaintiff) would be taken care of properly."* [Record, page 93.] And that this would have been equally true as to "all creditors" of Pacific Petroleum Company. [Record, page 94.] This proposed "general plan" has been already presented and discussed. It also is worthy of note that there was no attempt to directly contradict nor deny this testimony of Mr. Cochran, and also that at its conclusion plaintiff's counsel laid so much stress on Mr. Cochran's testimony that he had said to Mr. Odell that the plaintiff "would be taken care of." [Record, page 94.]

Moreover, there is nothing in the testimony to associate, or connect the Penn agreement with these alleged representations, even if they had been made. At the best, they were but oral promises, which, as already shown, were invalid, and unenforceable, even if proved. Nor could this alleged oral contract be made binding through any estoppel. This was decided in

Brightman v. Hicks, 108 Mass. 246,

the court holding that

"A promise within the statute of frauds could not be made binding by way of estoppel, though it had been acted upon."

The alleged representations do not appear to have reference "to a present, or past state of things," but are rather "a mere statement of intention or opinion," and consequently could not tend to establish any estoppel.

Bigelow on Estoppel (4th Ed.), page 555;

Cyc. of Law and Procedure, Vol. 16, page 752.

E.

Nor was plaintiff justified in relying on these representations, even if made. It is well settled that, to create an estoppel, the representation must be such as "to justify a prudent man in acting upon it."

In this instance, the representations were alleged to have been made to plaintiff's president, who is also an attorney-at-law, with some twenty-eight years of practice. And yet he testifies that he made positively no inquiries about the Penn agreement, on which plaintiff now so strenuously relies. This witness testified [Record, page 62] as follows:

"I can't say that I knew that there was some written agreement between the Pacific Petroleum Company and the Penn Development Company, *but I suspected there was; I didn't inquire as to the terms, it was none of my business what your relations were.*"

And that, too, in the face of the fact that he claims that this agreement bore on his company's property.

Probably the true explanation of plaintiff's position is found in the fact that it relied rather on Dorsey to carry through what it now claims the Penn Company agreed to do. It apparently accepted as a fact Dorsey's statement "that he had made an arrangement with the Penn Development Company by which that (the Dorsey contract) would be taken care of." [Record, page 52.] Mr. Odell testified that *"We (plaintiff) relied upon Senator Dorsey, who we thought was reliable,* and upon what Mr. Cochran said." [Record, page 53.] And again [Record, page 60]: *"I relied very much on Mr. Dorsey."*

Nor has plaintiff shown that it suffered any substantial loss, as it must do to create the claimed estoppel.

Cyc. of Law and Procedure, Vol. 16, page 745, states the law to be that:

"In order to create an estoppel *in pais,* the party pleading it must have been misled to his injury, that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect."

Plaintiff's sole claim, which might even tend to bring this case within the rule of law just cited, appears in the testimony of Mr. Odell [Record, pages 52-53] that, relying upon Mr. Cochran's alleged statements, "We (plaintiff) ceased further prosecution of this loan and didn't endeavor to pay up because we understood that

the Penn Development Company would take care of it, being a stronger corporation."

It appears that the plaintiff had been endeavoring to procure a loan on the property in suit, so as to take up its indebtedness to Citizens Trust & Savings Bank. It is to the endeavors to procure such a loan, this last testimony refers.

That such a claim is without any merit, at least to prove any loss, or damage to plaintiff, is clearly established by the record.

From the time this indebtedness to the bank was called on August 10th, 1913, not only plaintiff, but practically every one interested in it, and also Dorsey himself, had unsuccessfully tried to obtain a new loan on the property. Is it, therefore, probable, let alone possible, that such a loan could have been procured within the few days intervening between the day of the alleged representations, which Mr. Cochran fixes as not earlier than March 3, 1914 [Record, page 81], and the sale of this property on March 11, 1914? On this point Mr. Odell, on cross-examination, testified [Record, page 59]:

"Q. Well, didn't you know that between the time you saw Mr. Cochran and the day of the sale you could not have raised a dollar of that, or the Ventura-California Oil Company either? A. *I know nothing about it.*"

This answer certainly shows that plaintiff had no hope nor expectation that the required money could be raised in time, even if it had not discontinued its efforts, as claimed; although appellant also submits that

the record fairly shows that Peters was even then still continuing his efforts to procure the loan. [Record, pages 83, 84.]

The general question of estoppel, and its absolutely essential elements, are most fully discussed in

Biddle Boggs v. Merced M. Co., 14 Cal. 279,

where the court, at page 368, says:

"These qualifications in the application of the doctrine will be found fully sustained by the authorities. There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title—the effect of the estoppel being to forfeit his property and transfer its enjoyment to another. 'In all this class of cases,' says Story, speaking of equitable estoppels, 'the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which, in effect, implies fraud. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of ngligence, yet courts of equity will not grant relief. It has accordingly been laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud, or concealment, or negligence, so gross as to amount to constructive fraud.' (1 Story's Equity, Sec. 391.)"

It is also submitted that a corporation cannot be estopped by such representations as are relied on in this case.

It is respectfully submitted that plaintiff has totally failed to legally either prove or establish the claimed estoppel.

VIII.

In concluding its argument of this appeal, appellant would not only again direct attention to the many varied and inconsistent allegations, claims and theories advanced by the plaintiff to recover some kind of a decree in this action, but also to the uncertain character of the action, as tried.

The second amended complaint is entitled *"To Quiet Title, and Foreclose Contract."* [Record, page 18.]

The first alleged cause of action apparently relates to the quieting of title, and the second alleged cause of action to the foreclosure.

While, as appellant has already shown, Dorsey acquired no legal title to the property in question, it must, however, be conceded that Dorsey acquired certain rights under his contract with the plaintiff company; and that, as said contract was recorded, there was some record cloud on plaintiff's title to the property. It may also be further conceded that Dorsey, by his contract, obtained some equitable lien on the property, and that without his formal assent thereto, such a cloud and lien could be removed only by a judgment in an action to foreclose the contract. This later is no doubt all that plaintiff contemplated, and certainly all that it demanded in its complaint. [See prayer for judgment—Record, page 24.]

The Dorsey contract provided for two separate and different remedies in the event of his failure to carry out its provisions. One is a proper action "to collect the value" of any of the unpaid items specified in that

contract; and the other is an action "to foreclose this contract." [Record, page 14.]

The record shows that, while plaintiff was always talking about "foreclosing the contract," it was in reality trying to prove Dorsey's or Pacific Petroleum Company's personal liability for the moneys found to be unpaid. And this is positively established by the decree herein, which finds not only that Pacific Petroleum Company *"is personally liable for the debt,"* but also that the amount of any deficiency on the ordered sale of the property shall be reported, and the said company *"shall pay to the plaintiff the amount of such deficiency."* [Record, page 45.]

Plaintiff was thus permitted to completely change the character and nature of its action, and the issues as framed by the pleadings. All this was greatly to the prejudice and damage of this appellant, for if the action had been tried and determined solely on the complaint on which it was brought—to-wit, to foreclose the Dorsey contract—appellant submits that the judgment herein must have been in its favor because

(1) The Dorsey contract was not a lien on the property, at least in favor of the plaintiff.

(2) Even if it ever had been a lien, such a lien was extinguished by the sale of the property under the trust deed; and

(3) Penn Development Company had not assumed the Dorsey contract, nor in any way agreed to take the property subject to it. If it had assumed that contract, then the judgment for the indebtedness would have been against that company, instead of against Pacific

Petroleum Company. Nor, in fact, does the Penn agreement in the slightest particular refer to the Dorsey contract.

IX.

The Decree Herein Appealed From Should Be Reversed, and Judgment Entered That the Penn Development Company Has a Good and Legal Title, in Fee Simple, to the Property Involved in This Action.

All of which is respectfully submitted.

THEODORE MARTIN,
Solicitor for Appellant.

WM. H. COCHRAN,
Of Counsel.